Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LUCILLE WOLFORK, AS PARENT AND OF NEXT FRIEND OF MINOR, CAMILLE WOLFORK AND LUCILLE WOLFORK, INDIVIDUALLY,

Petitioners,

v.

GAIL RUTH TACKETT AND LEONA GATES DUNN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

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43 pp

QUESTION PRESENTED

Did the Georgia Supreme Court err in applying the federal doctrine of judicial estoppel, as outlined in *Southmark Corp. v. Trotter, Smith & Jacobs*, 212 Ga. App. 454, (1994), to preclude the plaintiff debtor from pursuing an unliquidated tort claim in Georgia state court because the debtor did not supplement a Chapter 13 bankruptcy petition or reopen the bankruptcy proceeding so as to list the cause of action which accrued after the filing of the petition but before the discharge of the bankruptcy?

PARTIES TO THE PROCEEDINGS

Counsel hereby certifies that the following have a pertinent interest in the proceedings of this case:

(a) Cobb, Bobby L. - Counsel for Gail Ruth Tackett
(b) Dunn, Leona Gates - Respondent
(c) Foreman, Kevin A. - Counsel for Petitioner
(d) Tackett, Gail Ruth - Respondent
(e) Waldon, Russell D. - Counsel for Leona Gates Dunn
(f) Wolfork, Lucille - Petitioner

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PETITION FOR A WRIT OF CERTIORARI

Lucille Wolfork, as parent and next friend of minor, CAMILLE WOLFORK and LUCILLE WOLFORK, Individually, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINION BELOW

The opinion of the Georgia Supreme Court (App., *infra* 1a) is reported as *Wolfork v. Tackett*, 273 Ga. 328 (540 S.E.2d 611) (Ga. Jan 8, 2001) (No. S00G0620).

JURISDICTION

The Georgia Supreme Court affirmed the Georgia Court of Appeals decision on January 8, 2001. Jurisdiction to review the judgment of the Georgia Supreme Court is conferred on this Court by Title 28, United States Code, § 1254 (1) and (2).

PERTINENT PROVISIONS

This case involves the interpretation of Title 11, United States Code, § 541 of the U.S. Bankruptcy Code, which states in relevant part as follows:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> > (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

. . .

(7) Any interest in property that the estate acquires after the commencement of the case.

This case involves an interpretation of Title 11, United States Code, § 1302 of the U.S. Bankruptcy Code, which states in relevant part as follows:

The trustee shall –

. . .

(2) appear and be heard at any hearing that concerns –

the value of property subject to a lien; confirmation of a plan; or

modification of the plan after confirmation;

(3) dispose of, under regulations issued by the Director of the Administrative Office of the United States Courts, moneys received or to be received in a case under chapter XIII of the Bankruptcy Act;

This case involves an interpretation of Title 11, United States Code, § 1302 of the U.S. Bankruptcy Code, which states in relevant part as follows:

> Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

Additionally, this case involves an interpretation of Title 11, United States Code, § 1306 of the U.S. Bankruptcy Code, which states in relevant part as follows:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title–
>
> > (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11 , or 12 of this title, whichever occurs first.

STATEMENT OF THE CASE

On August 15, 1994, Lucille Wolfork filed a Chapter 13 bankruptcy petition. On November 18, 1995, Lucille Wolfork and her daughter, Camille Wolfork, suffered injuries in a motor vehicle collision involving a vehicle being operated by Gail Ruth Tackett and a vehicle being operated by Leona Dunn. As a result of this accident, Lucille Wolfork filed a complaint with the State Court of Clayton County, Georgia on October 21, 1997, seeking damages.

At the time Lucille Wolfork filed her bankruptcy petition, she did not have a personal injury claim as this accident did not occur until after the filing her bankruptcy. The Chapter 13 bankruptcy petition only required her to list all causes of action to which she was a party within one year immediately preceding the filing of her bankruptcy case. Lucille Wolfork's bankruptcy was discharged on March 30, 1998.

On December 10, 1998, Dunn filed a motion for summary judgment asserting that the Wolfork's unliquidated tort claims against her was barred by the federal doctrine of judicial estoppel due to her failure to disclose the claims in her bankruptcy filings. On February 19, 1999, the trial court granted summary judgment to Dunn.

The Court of Appeals affirmed the decision of the trial court on December 3, 1999 and denied the petitioner's a motion for reconsideration on December 20, 1999. Thereafter, the petitioner, in accord with Rule 38 of the Supreme Court of Georgia, forwarded to the Clerk of the Court of Appeals her Notice of Intention to Apply for a Writ of Certiorari.

On June 12, 2000, the Supreme Court of Georgia granted the writ of certiorari in this case. The issue of first impression addressed in the Georgia Supreme Court was: Did the Court of Appeals err in applying the federal doctrine of judicial estoppel, as outlined in *Southmark Corp. v. Trotter, Smith & Jacobs*, 212 Ga. App. 454 (442 S.E.2d 265) (1994), to preclude the plaintiff debtor from pursuing an unliquidated tort claim in a Georgia state court because the debtor did not supplement a Chapter 13 bankruptcy petition or to reopen the bankruptcy proceedings so as to list a cause of action which accrued after the filing of the petition but before the discharge of the bankruptcy. On January 8, 2001, the Georgia Supreme Court affirmed the

Court of Appeals decision.

REASONS FOR GRANTING THE WRIT

This case raises an issue of vital importance to the federal bankruptcy courts: Whether a state court can apply the federal doctrine of judicial estoppel to preclude the prosecution of a post-petition cause of action that a discharged debtor failed to list on a bankruptcy petition. This petition presents an opportunity for the Court to clarify further the law regarding this subject.

I. THE SUPREME COURT SHOULD OVERTURN THE DECISION OF THE GEORGIA SUPREME COURT IN AFFIRMING THE COURT OF APPEAL'S APPLICATION OF JUDICIAL ESTOPPEL TO EXTINGUISH THE PROSECUTION OF A CLAIM BECAUSE THE DECISION HAS THE OVERREACHING EFFECT OF CUTTING OFF THE RIGHTS OF THE CHAPTER 13 TRUSTEE, CREDITORS AND THE U. S. BANKRUPTCY COURT.

This issue lies at the juncture of two competing interests. Reported decisions fall into one of two categories. Courts have resolved this issue by dismissal of claims on the ground of judicial estoppel. Other jurisdictions give determinative weight to the interest of the bankruptcy creditors of the debtor, who should be the initial recipients of any net recovery on the asset represented by the undisclosed claim. The two views are respectively found in the majority and dissenting opinions in *Oneida Motor Freight, Inc., v. United Jersey Bank*, 848 F.2d 414 (3d Cir.), *cert. denied*, 488 U.S. 967 (1988).

The applicability of judicial estoppel requires a determination that (1) a party's assertion of the claim in a judicial proceeding is inconsistent with a earlier successful

assertion in a prior proceeding; and (2) that the assertion of inconsistent positions is an attempt to deliberately manipulate the judicial system. *Southmark v. Trotter, Smith & Jacobs*, 212 Ga. App. 454 (1994); *See Chandler v. Sanford University*, 35 F. Supp.2d 861, 863 (N. D. Ala. 1999).

In Georgia, the federal doctrine of judicial estoppel has been applied to preclude the prosecution of a cause of action claim that a debtor failed to list as an asset on a bankruptcy petition. In *Southmark v. Trotter, Smith & Jacobs*, the Georgia Court of Appeals held that failure to disclose such a claim in a Chapter 11 proceeding authorizes entry of summary judgment against the debtor-plaintiff. 212 Ga. App. at 455-456. In *Wolfork v. Tackett*, 273 Ga. 328 (2001), the Georgia Supreme Court held that this duty extends to Chapter 13 bankruptcies as well.

However, other jurisdictions refuse to apply judicial estoppel to extinguish the prosecution of a claim. *Jinright v. Paulk*, 758 So.2d 553 (Ala. 2000); *In re Griner*, 240 B.R. 432 (S.D. Ala. 1999); *Phoenix Petroleum Co. v. United States*, 215 F.3d 1345, 1999 WL 521189 (Fed. Cir. 1999) (Unpublished Opinion); *Winmark Limited Partnership et al. v. Miles & Stockbridge, et al.*, 345 Md. 614 (1997); *Greenheart Durawoods, Inc. v. PHF Int'l Corp.*, 1994 WL 652434 (S.D.N.Y. 1994); *See also Oneida Motor Freight, Inc., v. United Jersey Bank*, 848 F.2d at 414 (3d Cir. 1988) (Stapleton, J., dissenting). These jurisdictions find that the application of judicial estoppel will be frustrated if defendants are allowed to use this doctrine to their advantage at the expense of plaintiff with valid claims.

1. Precluding the prosecution of a claim provides a windfall to the defendant.

The Alabama Supreme Court in *Jinright v. Paulk*, 758 So. 2d at 553, provide persuasive authority on this issue. That case is similar to the instant case. The Alabama

Supreme Court held that a debtor-plaintiff's failure to list a cause of action against a defendant in their Chapter 13 bankruptcy proceeding did not judicially estop them from pursuing their claim for damages. *Id.* The Court reasoned that the omission did not benefit the debtor-plaintiff or prejudice the defendant, and applying judicial estoppel would punish the debtor-plaintiff and their creditors and provide a windfall to the defendants. *Id.*

The Court opined that the purpose of the doctrine of judicial estoppel will not be accomplished, but, rather, will be frustrated if defendants are allowed to use this doctrine to their advantage at the expense of plaintiffs with valid claims. *Id.* at 557. The *Jinright* Court agreed with the Bankruptcy Court in *In re Griner* that whether state or federal common law governs, a debtor's mere knowledge or awareness of a potential claim and the debtor's failure to include the claim as an asset on the bankruptcy schedules filed with the court, without more, are not sufficient to invoke the doctrine of judicial estoppel. *Id.* at 559. The Court in evaluating the judicial estoppel defense outlined factors to consider in concluding whether that defense warrants entry of judgment as a matter of law, including (1) the chapter under which the debtor sought bankruptcy protection, (2) whether the debtor has been discharged in bankruptcy, (3) whether the debtor has amended the bankruptcy schedules to include the omitted cause of action, and (4) whether the defendant has been prejudiced by omission of the claim in the bankruptcy case.

In the instant case, the application of judicial estoppel has allowed the Respondents, Tackett and Gunn, to use this doctrine to their advantage at the expense of the Petitioners who have a valid claim. Tackett and Gunn have received a windfall since they are allowed to escape any potential liability to Wolfork on the basis that Wolfork failed to list her lawsuit in her bankruptcy proceeding. Moreover, neither Tackett nor Gunn were creditors in Wolfork's bankruptcy case and were in no way prejudiced

by Wolfork's failure to list the suit against them as an asset.

2. The application of judicial estoppel harms the real parties in interest.

The real parties in interest to any recovery from a cause of action are not the debtor-plaintiff, but the Chapter 13 Trustee and the creditors. A Chapter 13 trustee and debtor concurrently hold power to sue as to non-bankruptcy federal and state law claims. *In re Griner*, 240 B. R. at 436. A debtor's lawsuit against a defendant becomes "property of the estate" in a debtor's Chapter 13 proceeding. *Id.*; Title 11 U.S.C. § 541(a). Either the debtor or trustee, or both of them together, have standing to litigate non-bankruptcy matters. *Id.*; Title 11 U.S.C. §§ 541(a), 1302, 1303. While standing requires that plaintiffs demonstrate injury or a legally protected right, the real-party-in-interest principle directs attention to whether the plaintiff has a significant interest in the particular action. Pursuant to Title 11 U.S.C. § 541, a Chapter 13 Trustee has an interest in "property of the estate." Since a debtor's lawsuit is considered an asset of the bankruptcy estate, the Chapter 13 Trustee is an interested party to such claim. Creditors are interested parties by virtue of there interest in the debtor's estate. By precluding the prosecution of a lawsuit through judicial estoppel, state courts are effectively cutting off the rights and any potential recovery of the Chapter 13 Trustee and creditors who are the real parties in interest in a debtor's lawsuit. As such, the Georgia court's exercise of judicial estoppel is overly harsh and inequitable. Everyone, except the defendants, loses under this theory.

However, the Bankruptcy Court in *In re Griner*, provide well reasoned and instructive solutions to this dilemma.

> If a debtor fails to include assets on this schedule and

> later seeks to add them, the Bankruptcy Rules allow it "as a matter of course at any time before the case is closed." Fed. R. Bankr. P. 1009(a). A bankruptcy court has ample powers to punish debtors who wrongfully conceal assets, i.e. sanctions under Fed. R. Bankr. P. 9011, conversion of the case to Chapter 7 (§ 1307(c)), revocation of discharge (§ 1328(e)), referral for criminal charges (18 U.S.C. § 152 (1), (2), (3), (7)). 240 B. R. at 439.

Furthermore, the *Griner* Court reasoned that defendant's position punishes the creditors of the nondisclosing debtor, not just the debtor. *Id.* The better result is to allow the claim to be prosecuted and collected, order the funds paid toward claims filed in the case, and punish the debtor another way. *Id.*

Based on the above, the Petitioner has not misled the judicial system and should not be judicially estopped from pursuing personal injury claims in this case. Under the circumstances, barring this action would deprive the petitioner of her right to due process. Therefore, the Honorable Court should reverse the decision of the Georgia Supreme Court and reverse the summary judgment.

II. THE GEORGIA SUPREME COURT ERRED IN APPLYING THE DOCTRINE OF JUDICIAL ESTOPPEL BECAUSE THE TRIAL COURT DID NOT RELY UPON EVIDENCE WHEN IT RULED THAT THE PETITIONER SUCCESSFULLY ASSERTED AN INCONSISTENT POSITION IN THE BANKRUPTCY.

The applicability of judicial estoppel requires a determination that (1) a party's assertion of the claim in a judicial proceeding is inconsistent with a earlier successful assertion in a prior proceeding; and (2) that the assertion of inconsistent positions is an attempt to deliberately manipulate the judicial system. *Southmark*, 212 Ga. App. at 455; *Johnson v. Trust Co. Bank*, 223 Ga. App. 650 (1996); *See Chandler v. Sanford University*, 35 F. Supp.2d 861, 863 (N.D. Ala. 1999). The Court should preclude judicial estoppel in this case because (1) the trial court did not rely upon evidence when it ruled that the Petitioner successfully asserted an inconsistent position in the bankruptcy; and (2) an issue of fact remains as to whether the Petitioner intentionally asserted a contradictory position.

It is apparent that the first prong of judicial estoppel is not satisfied in this case. A party moving for summary judgment must provide the trial court with evidence supporting its application. *Jones v. Littleton*, 222 Ga. App. 494, 496-97 (2), 474 S.E.2d 714 (1996). In this case, the movant sought summary judgment asserting that judicial estoppel barred the petitioner's personal injury claim. As such, the movant should have presented evidence supporting its motion to meet its burden of proof. The record does not reflect that the trial court was provided with the Petitioner's bankruptcy pleadings, confirmation plan or other evidence when it ruled.

The trial court asserts that its finding were based upon "argument and citations of authority", not evidence submitted at the hearing. The trial court based its ruling solely on the admissions in the parties' summary judgment pleadings that the petitioner's bankruptcy was filed on August 15, 1994, and discharged on March 30, 1998. *See Versico, Inc. v. Engineered Fabrics Corp.*, 238 Ga. App. 837, 839 (1) (1999). Thus, the trial court neglected to analyze an essential element necessary to trigger the application of judicial estoppel that the Petitioner succeeded in the bankruptcy action.

Federal courts refuse to apply judicial estoppel when a debtor's Chapter 13 confirmation plan requires the debtor to pay its creditors 100 percent of the debt owed. *See e.g., Donato v. Metropolitan Life Ins. Co.*, 230 BR 418, 424 (N.D. Cal. 1999); *Elliot v. ITT Corp.*, 150 BR 36, 39 (N.D. Ill. 1992). Under these circumstances, the failure to disclose a personal injury action does not benefit the debtor or harm the creditors when a debtor's confirmation plan requires it to pay 100 percent on the plan. Id. As such, the Court should not presume, as a matter of law, that a Chapter 13 bankruptcy discharge, standing alone, meets the moving party's burden of proof that the petitioner succeeded in the bankruptcy action.

At the hearing, the moving party failed to provide bankruptcy pleadings, confirmation plan or any other evidence showing that the petitioner succeeded in the bankruptcy action. The trial court did not rely upon evidence presented at the hearing, rather it relied upon "argument and citations of authority" when it ruled on the summary judgment motion. Therefore, the trial court erred when it concluded that judicial estoppel barred the petitioner's claim because the moving party failed to meet their burden of proving the "success" component of this doctrine. Therefore, this Court should reverse the decision of the Georgia Supreme Court and reverse the summary judgment.

III. THE GEORGIA SUPREME COURT ERRED IN APPLYING THE DOCTRINE OF JUDICIAL ESTOPPEL IN THIS CASE BECAUSE AN ISSUE OF FACT REMAINS AS TO WHETHER THE PETITIONER INTENTIONALLY ASSERTED A CONTRADICTORY POSITION.

With regard to the second prong of the judicial estoppel analysis, courts have ruled that a combination of a party's knowledge of the claim and motive for concealment in the face of a duty to disclose the claim

provides ample evidence of intent to manipulate the judicial system. *Chandler*, 35 F.Supp. 2d at 864; *See e.g. Ryan Operations, G.P. v. Santaim-Midwest Lumber Co.*, 81 F3d 355, 363 (3rd Cir. 1996); *In re Tippens*, 221 B.R. 11, 27 (N.D. Ala. 1998). However, courts have not applied judicial estoppel to bar a party from asserting claims not disclosed during the course of bankruptcy proceedings where there is no knowledge and no duty to disclose. *See e.g. Ryan*, 81 F.3d at 363; *Brassfield v. Jack McLendon Furntiture, Inc.*, 953 F. Supp. 1424, 1433 (M.D. Ala. 1996). The underlying purpose behind judicial estoppel is the prevent an ***intentional*** or ***calculated*** "assertion of divergent sworn positions." *Johnson*, 223 Ga. App. at 650.; *See also Southmark*, 212 Ga. App. at 455. In this case, the facts demonstrate that the Petitioner did not fail to disclose any litigation that arose from pre-petition bankruptcy matters amounting to a denial that such claims exist. The doctrine of judicial estoppel is directed only against those litigants who intentionally seek to manipulate the court system. *Johnson*, 223 Ga. App. at 651.

Even if the Court finds that the Petitioner had a duty to later supplement her bankruptcy petition to include a post-petition cause of action, the Court should distinguish between ***intentional misrepresentation*** and an ***innocent omission***. Such a determination should be left to the trial court to decide. *See Clark*, 235 Ga. App. at 446. The Petitioner is unlike the plaintiff in *Chandler* who was aware of her claims and had an obvious motive for concealing them. *See Chandler*, 35 F. Supp.2d at 864. In the case at bar, the Petitioner did not fail to disclose any litigation that arose from pre-petition bankruptcy matters amounting to a denial that such claims exist.

Moreover, the Respondents presented no evidence at trial that the Petitioner intentionally or fraudulently concealed her claims. Judicial estoppel is inapplicable when a party's prior position was based on *inadvertence* or *mistake*, not intentional wrongdoing or part of a scheme to

mislead the court. *See e.g. Donato,* 230 B.R. at 421. In addition, during the pendency of her bankruptcy case, Georgia case law was silent and Georgia Courts had not ruled on disclosure of litigation subsequent to filing a bankruptcy petition. As such, the petitioner was not required to divulge this lawsuit in her bankruptcy petition because the cause of action arose after its filing.

Under the circumstances, the Court is penalizing the petitioner who followed court instruction and honestly represented that she had no personal injury claim when she filed for bankruptcy. As a matter of public policy, justice is not served by automatically punishing a party who honestly represents that they had no personal injury claim at the time they filed for bankruptcy.

Unless a clear distinction is made, affirming this judgment has the over-reaching effect of barring legitimate causes of action by litigants who innocently fail to supplement a bankruptcy petition or to reopen bankruptcy proceedings so as to list post-petition causes of action. In addition, by affirming this judgment a "loop-hole" is created whereby personal injury defendants can escape the judicial process and evade justice. This decision is counter to the intended purpose of judicial estoppel.

Based on the facts in this case, the Petitioner has not misled the judicial system and should not be judicially estopped from pursuing her personal injury claim in this case. Therefore, the Honorable Court should reverse the decision of the Georgia Supreme Court and reverse the summary judgment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Honorable Court grant her Petition for Writ of Certiorari and review the judgment entered herein, and thereafter authorize and allow the Petitioner's counsel to

address the United States Supreme Court on the grounds for review asserted in this petition.

Dated: April 4, 2001.

APPENDIX

IN THE STATE COURT OF CLAYTON COUNTY

STATE OF GEORGIA

LUCILLE WOLFORK,
as parent and next friend of minor,
CAMILLE WOLFORK

and LUCILLE WOLFORK,

individually,

Plaintiff

GAIL RUTH TACKETT and
LEONA GATES DUNN,

Defendant

CIVIL ACTION FILE NO. 97CV05290B

ORDER

The defendant, Leona Gates Dunn, filed her Motion for Summary Judgment. After having heard argument and citations of authority, the Court finds as follows:

The plaintiff, Lucille Wolfork, filed a Chapter 13 Petition in the United States Bankruptcy Court on August 15, 1994. The incident giving rise to the case before this court occurred on November 18, 1995. The plaintiff's bankruptcy was discharged on March 30, 1998. At no time did the plaintiff supplement her petition in the bankruptcy court to disclose the personal injury claim.

It appears to the Court that 11 U.S.C.A. § 1306(a) provides that "property of the estate includes. . .all property...that the debtor acquires after the commencement of this case but before the case is closed, dismissed or converted..." Thus, plaintiff should have amended her petition to include the claim which is now before this Court.

Because she did not, the reasoning applied in Byrd v. JRC Towne Lake. Ltd.. 225 Ga. App. 506 (1997) would seem to apply here. The doctrine of judicial estoppel bars a personal injury plaintiff from pursuing his or her claim when she failed to disclose the claim in his or her bankruptcy petition.

As a result, the Court finds that no genuine issue as to any material fact remains as to Lucille Wolfork's individual claim. Summary judgment is hereby granted in favor of the defendant and against Lucille Wolfork individually.

SO ORDERED. This 19th day of February, 1999.

s/_____
Judge Harold G. Benefield

WHOLE COURT

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 17, 1998)

December 3, 1999

In the Court of Appeals of Georgia

A99A1602. WOLFORK et al. v. TACKETT et al.

EL-032

ELLINGTON, Judge.

Georgia applies the federal doctrine of judicial estoppel to preclude the prosecution of unliquidated tort claims that discharged debtors failed to list as assets in their federal bankruptcy petitions. *Southmark Corp. V. Trotter, Smith & Jacobs*, 212 Ga. App. 454, 455-456 (442 SE2d 265) (1994). The question in this appeal is whether a debtor's failure to supplement a Chapter 13 bankruptcy petition or to reopen the bankruptcy proceedings so as to list a cause of action accruing after the filing of the petition but before the discharge of the bankruptcy precludes the debtor from pursuing the cause of action in a Georgia state court.

In August 1994, Lucille Wolfork filed a Chapter 13 bankruptcy petition. In November 1995, she and her daughter allegedly suffered injuries in a collision involving autos driven by Tackett and Dunn. On behalf of herself and her daughter, Wolfork sued them in October 1997 for negligence. After the bankruptcy was discharged in March 1998, Dunn moved for summary judgment on Wolfork's personal claim on grounds of judicial estoppel. Finding

Wolfork had not supplemented her petition or moved to reopen the bankruptcy so as to list the cause of action as an asset of the estate, the trial court granted summary judgment to Dunn.

All legal and equitable interests of the debtor in property as of the filing of the bankruptcy petition are considered property of the bankruptcy estate. 11 U.S.C. § 541 (a) (1). Unliquidated tort claims are personal property included as part of the estate. *Byrd v.JRC Towne Lake, Ltd.*, 225 Ga. App. 506 (484 SE2d 309) (1997). Federal bankruptcy law strictly requires the debtor to disclose all assets as part of the bankruptcy petition. *Southmark*, 212 Ga. App. at 455-456.

Explaining the federal doctrine of judicial estoppel, *Southmark* stated that a party may not assert a position in a judicial proceeding which is inconsistent with a position successfully asserted by it in a prior proceeding. *Id.* at 455. The failure to disclose an asset (such as a cause of action) in a bankruptcy proceeding amounts to a denial that such a claim exists and bars subsequent attempts to pursue it. *Id.* at 456. Accordingly, the Court in *Southmark* affirmed summary judgment in favor of the alleged tortfeasor where the claim, having arisen pre-petition, had not been listed in the schedule of assets in the plaintiff's Chapter 11 bankruptcy petition. Accord, *Byrd*, 225 Ga. App. at 508 (failure to list pre-petition tort claim in Chapter 13 petition is grounds for summary judgment).

In a Chapter 13 bankruptcy case, property of the estate also includes all property acquired by the debtor during the bankruptcy proceeding. 11 U.S.C. § 1306 (a) (1). A tort claim in favor of the debtor arising after the filing of the Chapter 13 bankruptcy petition but before the bankruptcy is closed is considered after-acquired property that is part of the estate. *In re Rivera*, 186 BR 505, 507 (D. Kan. 1995); *see In re Brown*, 159 BR 1014, 1018 (Bankr. S.D. Ga. 1993); *In re Cox*, 214 BR 635, 649 (Bankr. ND. Ala. 1997).

The same is not true of Chapter 7 cases. Compare *In re Bobroff*, 766 F2d 797, 803 (3rd Cir. 1985) and *In re Fleet*, 53 BR 833, 838 (Bankr. E.D. Pa. 1985).

The duty to amend Chapter 13 bankruptcy schedules is clear. A debtor may not conceal property belonging to the estate. 18 U.S.C. § 152 (1). A debtor has an affirmative duty to supplement the list of assets with any claims arising during the pendency of the bankruptcy proceeding. *Chandler v. Samford Univ.*, 35 FSupp2d 861, 864 (N.D. Ala. 1999); *see* 11 U.S.C. § 541 (a) (7); *In re Easley*, 205 BR 334, 335 (Bankr. M.D. Fl. 1996). Failure to timely amend or supplement the list of assets amounts to a denial that such a claim exists. *Southmark*, 212 Ga. App. at 455. Because Wolfork failed to supplement her Chapter 13 bankruptcy petition with the post-petition tort claim, she is barred by the principle of judicial estoppel from pursuing her claim after the bankruptcy proceeding was closed.

Distinguishable are those cases where the debtor moved to reopen the bankruptcy proceeding to amend the asset schedule to include the tort claim, for then the proceeds of the claim would have inured to the benefit of the creditors, and the inconsistency of declaring that no such asset existed would have been cured through amendment. *Clark v. Perino*, 235 Ga. App. 444, 445-446 (1) (509 SE2d 707) (1998); *see Moore v. Bank of Fitzgerald*, 225 Ga. App. 122, 124 (1) (483 SE2d 135) (1997); *Johnson v. Trust Co. Bank*, 223 Ga. App. 650, 651-652 (478 SE2d 629) (1996). Wolfork did not attempt to reopen the case, even though the bankruptcy court had the discretion to grant a reopening under 11 U.S.C. § 350 (b). *In re Schreiber*, 23 F2d 428, 430 (2d Cir. 1928); *In re Daniel*, 205 BR 346, 348 (Bankr. N.D. Ga. 1997); *Brown, supra*, 159 BR at 1018. "Unscheduled assets, newly discovered assets, or concealed assets usually furnish a basis for reopening the case." *2 Norton Bankruptcy Law & Practice* 2d, § 34-4, p. 34-6 (1997). The bankruptcy court's power to reopen was not circumscribed by any particular time limit. *In re Dodge*, 138 BR 602, 605 (Bankr.

E.D. Cal. 1992). Wolfork's decision not to seek to reopen mandates summary judgment against her.

Because of the potential impact on monetary claims, litigation and bankruptcy attorneys should carefully review the principles set forth in this opinion and act accordingly.

Judgment affirmed. Johnson, C.J., McMurray. P.J., Ruffin. J., concur. Blackburn, P. J., and Andrews. P.J., concur fully with the majority and specially, joined by Ellington. J., Barnes. J., dissents.

A99A1602. WOLFORK et al. v. TACKETT et al.

EL-082

BLACKBURN, Presiding Judge, concurring specially.

I concur fully in the opinion and analysis of the majority. I write separately, however, to address issues raised by the dissent, which overlooks both precedent and evidentiary requirements to reach what it deems to be the most equitable result.

Neither of the reasons given by the dissent for reversing the trial court is supported by law or fact in this case. The dissent argues that the plaintiff should be relieved of the consequences of fulfilling her mandatory duty to update her bankruptcy petition because no evidence in the record shows that the plaintiff successfully asserted a position on her personal injury claim in the bankruptcy proceedings. To reach this conclusion, the dissent makes a series of unfounded assumptions. First, the dissent assumes that no evidence was admitted by the trial court during the summary judgment hearing in this case, despite the fact that the appellant failed to provide this Court with a transcript of that hearing. Then, based on this general assumption, the dissent more specifically assumes that the trial court never received evidence relating to the contents of the bankruptcy pleadings, including the confirmation plan. Next, the dissent theorizes what the terms of the confirmation plan, which may or may not have been placed before the trial court, might have been, and, on the basis of this speculated plan, the dissent reverses the decision of the trial court.

> This analysis is problematic. As we have long held,
>
> [w]hen an appellant omits evidence necessary for determination of issues on

> appeal affirmation is required. It is well established that the burden is on the party alleging error to show it by the record and that where the proof necessary for determination of the issues on appeal is omitted from the record, an appellate court must assume that the judgment below was correct and affirm.

(Citation and punctuation omitted.) *Griffin v. Travelers Ins. Co.*, 230 Ga. App. 665, 666 (497 SE2d 257) (1998).

> Under these circumstances, we must rely on the presumption in favor of the regularity of all proceedings in a court of competent jurisdiction (*Siegal v. Gen. Parts Corp.*, 165 Ga. App. 339 (301 SE2d 292) (1983)), assume that the evidence was sufficient to support the trial court's ruling, and affirm the judgment. *Acker v. Jenkins*, 178 Ga. App. 393, 394 (343 SE2d 160) (1986). *See also Thomas v. Bartlett*, 183 Ga. App. 412 (359 SE2d 156) (1987). When there is nothing in the record to support the contention of error, there is nothing presented to this Court for review. *Brookhaven Assoc. v. DeKalb County*, 187 Ga. App. 749, 750-751 (371 SE2d 231) (1988)].

(Punctuation omitted.) *City of Atlanta v. Starke*, 192 Ga. App. 267, 268-269 (1) (c) (384 SE2d 419) (1989).

In reaching its opinion, the dissent not only fails to presume the regularity of the proceedings below, but it speculates what the evidence could possibly show and presumes that the trial court acted improperly on the basis of this imagined evidence. The result is that, although the burden on appeal belongs to the appellant, the dissent construes evidentiary omissions in the appellate record to benefit the appellant and hinder the appellee. This result is

inapposite to our review of cases on appeal, and, as such, it cannot provide a basis for reversal of the trial court.

To support its position, the dissent cites *Seamans v. True*, 247 Ga. 721 (279 SE2d 447) (1981). Contrary to the dissent's position, *Seamans* is factually distinguishable and does not require a different result in this case. In Seamans, the Supreme Court held:

> The trial court's order granting the defendants' motion for summary judgment states that the grant was based upon the pleadings of the parties and the affidavit of Arthur True. Accordingly, we do not assume that evidence was presented at the motion for summary judgment hearing.

(Emphasis supplied.) *Id.* at 723. Therefore, in *Seamans*, the trial court limited its review to specifically enumerated and distinct pieces of evidence. In this case, on the other hand, the trial court's order states that its findings were based upon "argument and citations of authority." The dissent argues, therefore, that the trial court did not consider other documents or testimony. Contrary to the dissent's contentions, the trial court in this case did not state that it was limiting its decision to matters in the record, as implied by the dissent.

At the summary judgment hearing, the trial court may have properly considered documents which were never formally introduced into evidence or included in the appellate record, as well as testimony which may have included admissions or stipulations and other such items not before us. That is why the burden lies with the appellant to provide a transcript of the hearing, or otherwise establish what occurred at the hearing. The record may also be shown as provided in O.C.C.A. § 5-6-41 (i), but appellant has not availed herself of this remedy. Therefore, we must conclude under these facts that the

ruling of the trial court was authorized. Therefore, *Seamans* has no application here, and it does not support the dissent's erroneous presumption of the irregularity of the trial court's actions.

Alternatively, the dissent concludes that the trial court must be reversed because an issue of fact remains as to whether the plaintiff intentionally asserted a contradictory position in her bankruptcy pleadings. While the dissent correctly indicates that the failure to disclose an accrued cause of action when initially filing for bankruptcy must be treated as a denial that the claim exists, it argues, without citation to any authority, that a different standard should be applied to claims acquired after the initial pleadings are made. In the latter situation, the dissent proposes to apply judicial estoppel to those making affirmative misrepresentations but not to those who passively fail to supplement their bankruptcy petitions. This distinction, however, is not supported by precedent.

In *Southmark Corp. v. Trotter, Smith &c.*, 212 Ga. App. 454, 455-456 (442 SE2d 265) (1994), a case involving a filing under Chapter 11 of the Bankruptcy Code, this Court discussed the necessity to strictly enforce reporting procedures in bankruptcy cases.

> These cases involve primarily the obligation placed upon the debtor in a Chapter 11 bankruptcy case to file a list of assets in which it must disclose any litigation which might arise from pre-bankruptcy matters. Compliance with disclosure requirements is essential to maintaining a bankruptcy case. *In re Roberts*, 117 B.R. 677; *In re Hubbard*, 96 B.R. 739. In the light of the stringent disclosure requirements under Chapter 11, the failure to disclose such information is viewed as amounting to a denial that such claims exist. This de facto denial triggers

> the application of several types of issue preclusion to bar subsequent attempts to prosecute such actions. *See Oneida Motor Freight v. United Jersey Bank*, 848 F2d 414; *Westland Oil Dev. Corp. V. MCORP Mqmt. Solutions*, 157 B.R. 100, 102; *In re Standfield*, 152 B.R. 528.

Id.

The mere fact that a cause of action accrues after the initial filing of a bankruptcy petition is not a sufficient reason to modify our application of judicial estoppel. Whether the property is acquired before or after the initial filing, the duty imposed on a debtor to disclose it remains the same, and compliance with disclosure requirements after the initial filing remains crucial to the maintenance of a bankruptcy case. *Id.* The dissent provides neither a compelling reason for contravening the historical adherence to disclosure compliance nor any distinctions in federal law relating to such compliance which would support the result it espouses.

While I appreciate the motivation behind the dissent's position, I must point out that this Court is neither a court of equity nor a body with state or federal legislative powers. We are not free to fashion amendments to statutory disclosure requirements to fit our sense of equity. We are bound by the explicit statutory language and precedent laid before us, and, although we may criticize these sources, we must nevertheless follow their guidance, even if we are unsatisfied with the result. The doctrine of judicial estoppel is designed to protect the integrity of the judiciary. *Id.* To retain that integrity in our application of this doctrine, we must be consistent with our analysis of precedent that is clear and unambiguous. If we fail to do so, only then will the result be truly incompatible with justice.

I am authorized to state that Presiding Judge Andrews and Judge Ellington join in this special concurrence.

A99A1602. WOLFORK v. TACKETT ET AL.

EI-082

BARNES, Judge, dissenting.

I respectfully dissent.

The purpose and justification for judicial estoppel is "to prevent the use of intentional self–contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." (Emphasis supplied.) *Southmark Corp. v. Trotter. Smith & Jacobs*, 212 Ga. App. 454, 455 (442 SE2d 265) (1994). It is "directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings." (Emphasis supplied.) *Johnson v. Trust Company Bank*, 223 Ga. App. 650, 651 (478 SE2d 629) (1996). Finally, it can only be applied to preclude "a party from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding." (Emphasis supplied.) *Southmark, supra*, 212 Ga. App. at 455.

We should not apply judicial estoppel in this case for two reasons: (1) no evidence shows a previous position successfully asserted by the plaintiff; and (2) an issue of fact exists as to whether the plaintiff intentionally asserted a contradictory position.

The first reason precluding the application of judicial estoppel is rooted in the evidentiary burden placed on a party moving for summary judgement. If a defendant moves for summary judgment based upon a defense, as opposed to a lack of evidence supporting an essential element of the plaintiff's case, the defendant must provide the trial court with evidence supporting application of the

defense.[1] *See Jones v. Littlelohn*, 222 Ga. App. 494, 496-97 (2) (474 SE2d 714) (1996). In this case, the defendant sought summary judgment from the trial court on the sole ground that the defense of judicial estoppel barred the plaintiff's claim against her. As a result, she needed to come forward with evidence supporting the application of judicial estoppel to meet her burden of proof below[2]. At the time of the trial court's ruling, none of the plaintiff's bankruptcy pleadings were in the record. The fact that the plaintiff's bankruptcy was filed on August 15, 1994 and discharged on March 30, 1998, is established only through admissions in the parties' summary judgment pleadings. *See Versico, Inc. v. Engineered Fabrics Corp.*, 238 Ga. App. 837, 839 (1) (SE2d) (1999).

A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. *Rice v. Huff*, 221 Ga. App. 592, 593 (472 SE2d 140) (1996). In this case, we have been provided with the entire record of the evidence before the trial court at the time it ruled on the defendant's summary judgment motion.[3] This record fails to show an essential requirement

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1

If a defendant's motion is based upon a lack of evidence supporting an essential element of the plaintiff's case, the Supreme Court's decision in *Lau's Corp. Inc. v. Haskins*, 261 Ga. 491 (405 SE2d 474) (1991) allows the defendant to meet its burden by merely pointing out the absence of evidence in the record to support the plaintiff's case.

2

This burden of proof should not be confused with the burden of proof on appeal to show error based on the record created below.

3

The record does not include a transcript from the hearing on the summary judgement motion, perhaps because it was not transcribed. However, th trial court's order states that its findings were based upon "argument and citations of authority" and there is no indication in the record that evidence was submitted to the trial court during the

for application of judicial estoppel -- that the plaintiff's previous position was successfully asserted.

Evidence that a plaintiff's Chapter 13 bankruptcy case has been discharged, does not, standing alone, establish that the plaintiff "successfully asserted" an inconsistent position in the bankruptcy. A debtor's confirmation plan could require a debtor to pay its creditors 100 percent of the money owed; in this circumstance, a failure to disclose a personal injury action would not benefit the debtor or harm the creditors. *See*, e.g., *Donato v. Metropolitan Life Ins. Co.*, 230 BR 418, 424 (ND Cal. 1999); *Elliott v. ITT Corp.*, 150 BR 36, 39 (ND Ill. 1992).

Federal courts recognize the necessity of the debtor's "success" in this context, and refuse to apply judicial estoppel when a Chapter 13 confirmation plan requires the debtor to pay 100 percent of the debt owed. *Id.* We should follow their lead, and refuse to presume, as a matter of law, that a Chapter 13 bankruptcy discharge, standing alone, fulfills the defendant's burden of proving the plaintiff's successful assertion of an inconsistent position.

We cannot presume, from the absence of a transcript of the summary judgment hearing, that evidence was submitted during this hearing which supports the trial court's grant of summary judgment. In *Seamans v. True*, 247 Ga. 721 (247 SE2d 447) (1981), our Supreme Court rejected an identical argument, stating:

The defendants note the absence of a transcript of the hearing on the motion for summary judgment and argue that this court must assume that evidence was presented at said hearing and that such evidence was sufficient to support the trial court's grant of summary judgment.

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summary judgment hearing.

The trial court's order granting the defendants' motion for summary judgment states that the grant was based upon the pleadings of the parties and the affidavit of Arthur True. Accordingly, we do not assume that evidence was presented at the motion for summary judgment hearing. This argument is without merit.

Id. at 723.

In this case, the order granting summary judgment to the defendant states that the trial court's findings were based upon "argument and citations of authority," not evidence submitted during the hearing. It does not recite facts supporting the conclusion that Wolfork successfully asserted an inconsistent position in her Chapter 13 bankruptcy and neglects to analyze this prerequisite to the application of judicial estoppel. The only facts recited by the trial court are those included in the written arguments submitted to it by the parties. Under these circumstances, we cannot assume evidence was presented at the summary judgment hearing that supports a conclusion that is not contained in the trial court's written order granting summary judgment. *Id.*

The facts and circumstances of this case are distinguishable from cases in which the trial court's order demonstrates that it relied upon evidence, not included in the record on appeal, when it ruled on a summary judgment motion. *See*, e.g., *Lee v. Trust Co. Bank*, 204 Ga. App. 28, 29 (2) (418 SE2d 407) (1992) (trial court's order recites that evidence was presented at the summary judgment hearing and the hearing transcript was not part of the record on appeal); *Georgia Recovery. Inc. v. Danley*, 215 Ga. App. 236, 238 (2) (450 SE2d 263) (1994) (trial court's order shows that evidence was presented at the summary judgment hearing and the hearing transcript was not part of the record on appeal).

The defendant has apparently recognized the problem caused by its failure to meet its burden of proof below. After the plaintiff filed her notice of appeal on March 11, 1999, the defendant filed a "Supplemental Brief in Support of Motion for Summary Judgment" in the trial court and included, for the first time, a portion of the plaintiff's bankruptcy pleadings labeled Exhibit "A." She also requested "that the clerk supplement the record that has been filed with the Court of Appeals." After transmitting the supplemental brief to this Court, the state court clerk's office notified this Court that Exhibit "A" was not attached to the defendant's original summary judgment motion. As a result, it should not have been sent to this Court and we will not consider it. *RC Cola Bottling Co., Inc. v. Vann*, 220 Ga. App. 479 (1) (469 SE2d 523) (1996). We note, however, that consideration of Exhibit "A" would not alter the result in this case because it does not include the confirmation plan or any other evidence showing the plaintiff succeeded in the bankruptcy action.

Because the defendant failed to meet her burden of proving the "success" component of judicial estoppel, the trial court erred when it concluded this doctrine barred the plaintiff's claim. Our analysis does not end here, however, because judicial estoppel should not have been applied for a second, alternative reason.

In this case, we are addressing, for the first time,[4] whether a debtor's failure to supplement her bankruptcy petition to disclose a personal injury cause of action that accrues over a year after she filed the bankruptcy petition warrants the application of judicial estoppel as a matter of law. When analyzing this issue, we must keep in mind the purpose behind judicial estoppel – preventing intentional

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4

Since this is an issue of first impression, it logically follows that authority cannot be cited to directly support this portion of the dissent's analysis. For the same reason, this analysis does not advocate a change in the law.

or calculated "assertion of divergent sworn positions." *Johnson, supra,* 223 Ga. App. at 650. *See also Southmark, supra,* 212 Ga. App. at 455.

It is well established that a failure to disclose an accrued cause of action in response to a direct question should be treated as a denial that the claim exists and thus, a "position" for purposes of judicial estoppel. *Southmark,* 212 Ga. App. at 456; *Byrd v. JRC Towne Lake,* 225 Ga. App. 506, 507-508 (484 SE2d 309) (1997) . These cases, however, do not govern the result in this case because the plaintiff honestly answered the direct question put to her in her Chapter 13 petition.

Although she did have a duty to later supplement her bankruptcy petition to include the after -- acquired cause of action, *Chandler v. Samford Univ.*, 35 F.Supp.2d 861, 864 (ND Ala. 1999), we should draw a distinction between affirmative misrepresentations and passive failures to supplement for purposes of judicial estoppel. An affirmative misrepresentation about an existing cause of action supports the inference, as a matter of law, that the person making the misrepresentation intentionally asserted a contradictory position. We cannot, however, draw the same inference from the passive conduct of failing to supplement a bankruptcy petition with an after-acquired cause of action, standing alone. While it could be an intentional omission warranting the application of judicial estoppel, it could also be an innocent mistake. Based on the facts of this case, the issue of whether the plaintiff intentionally asserted a contradictory position should be left for the finder of fact to decide. *See Clark v. Perino,* 235 Ga. App. 444, 446 (1) (509 SE2d 707) (1988).

Justice will not be served by automatically punishing a party who honestly represents that she had no personal injury causes of action at the time she files a bankruptcy petition. Instead, a windfall is bestowed upon an undeserving party, While it is true that we are not "a

court of equity" with power, for example, to issue injunctions, the principles of justice and equity should guide us when carrying out our duty to apply the law to the facts before us.

For the above-stated reasons, I respectfully dissent from the majority opinion.

Court of Appeals
of the State of Georgia

ATLANTA, DECEMBER 20, 1999

The Court of Appeals hereby passes the following order:

Case No. A99A16Q2

LUCILLE WOLFORK V. GAIL RUTH TACKETT ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta

DEC 20 1999

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

s/_____

In the Supreme Court of Georgia

Decided: JAN-8, 2001

S00G0620. WOLFORK v. TACKETT et al.

FLETCHER, Presiding Justice.

The Court of Appeals affirmed the grant of summary judgment to Gail Tackett in a personal injury action brought by Lucille Wolfork, concluding that Wolfork's failure to disclose her claim for personal injuries as an asset in her Chapter 13 bankruptcy barred her tort claim.[1] This Court granted certiorari to consider whether judicial estoppel applies to a tort claim that arises after the filing of a Chapter 13 bankruptcy petition. Because Chapter 13 debtors are required to disclose assets acquired during the pendency of the bankruptcy, we hold that judicial estoppel may apply to Chapter 13 cases and we affirm.

The federal doctrine of judicial estoppel "precludes a party from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding."[2] This doctrine is commonly applied to preclude a bankruptcy debtor from pursuing a damages claim that he failed to include in his assets in the bankruptcy petition.[3] A failure to reveal assets, including unliquidated tort claims, operates as a denial that such assets exist, deprives the bankruptcy court of the full information it needs to evaluate and rule upon a bankruptcy petition, and deprives creditors of resources that may satisfy unpaid obligations. The

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[1] *Wolfork v. Tackett,* 241 Ga. App. 633 (1999)

[2] *Southmark v. Trotter, Smith & Jacobs,* 212 Ga. App. 454, 455 (442 SE2d 265) (1994)

[3] *Id.*

application of the doctrine preserves the integrity of the judicial forum by not permitting a debtor to take inconsistent positions to manipulate the system.[4]

The bankruptcy estate in Chapter 13 cases, like Chapter 11 cases, includes property acquired during the pendency of the proceedings.[5] Thus, a petitioner in a Chapter 13 proceeding is required to disclose all property, including tort claims, acquired before the discharge of the bankruptcy proceeding.[6] The bankruptcy code permits a petitioner to seek to reopen the case to amend the schedules of assets to disclose newly discovered assets.[7] Because the Chapter 13 debtor is under the same obligations as the Chapter 11 debtor to reveal assets during the pendency of the bankruptcy proceeding, the rationale and public policy supporting the application of judicial estoppel in Chapter 11 proceedings apply equally to Chapter 13 bankruptcy petitions. Therefore, judicial estoppel is appropriately applied in cases in which a bankruptcy petitioner fails to disclose a tort claim acquired during the pendency of the Chapter 13 proceeding.[8]

Judgment affirmed. All the Justices concur.

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[4] *Id.*

[5] 11 U.S.C. § 1306(a)(1)

[6] *See* 11 U.S.C. §521(1) and 541(a)(7)

[7] *See* 11 U.S.C. §350(b)

[8] *See also Smalls v. Walker*, 243 Ga. App. 453 (2000); *Byrd v. JRC Towne Lake Ltd.*, 225 Ga. App. 506 (484 SE2d 309) (1997)

Supreme Court, U.S.
FILED
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CLERK

No. 00-1798

In The

Supreme Court of the United States

LUCILLE WOLFORK, as parent and next friend of minor, CAMILLE WOLFORK and LUCILLE WOLFORK, Individually,

Petitioners,

v.

GAIL RUTH TACKETT and LEONA GATES DUNN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Georgia Supreme Court err in applying the Georgia state law doctrine of judicial estoppel, as outlined in *Southmark Corp. v. Trotter, Smith & Jacobs*, 212 Ga. App. 454 (1994), to preclude the plaintiff from recovering a judgment in a personal injury action where the plaintiff debtor failed to disclose to the Bankruptcy Court, the Bankruptcy Trustee and her creditors the injury claim as a potential asset as required by law?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants respectfully submit that the decision below correctly analyzed the facts and applied governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

This case involves an automobile accident which occurred on November 18, 1995, in which petitioners allegedly were injured. At the time of the accident, petitioner Lucille Wolfork was in Chapter 13 Bankruptcy. The bankruptcy petition was filed on August 15, 1994, prior to the accident. At the time of the accident, the bankruptcy case was ongoing. On October 21, 1997, petitioner filed a personal injury action in the State Court of Clayton County. On March 30, 1998, more than two years after the accident and six months after the filing of this lawsuit, the petitioner's bankruptcy was discharged. At no time did petitioner disclose to the Bankruptcy Court, the Bankruptcy Trustee or creditors her personal injury claim as a potential asset as required by law.

Petitioner was under an affirmative duty to supplement her bankruptcy petition to disclose post-petition assets. However, throughout the existence of the personal injury claim, the Bankruptcy Court, the Bankruptcy Trustee and the petitioner's creditors were under the mistaken belief that there was no claim which might provide additional assets to fulfill petitioner's obligations to her creditors. Moreover, at no time since the 1995

accident has petitioner attempted to reopen her bankruptcy to disclose the existence of her personal injury claim.

The trial court, the Georgia Court of Appeals and the Supreme Court of Georgia all correctly applied the Georgia state law doctrine of judicial estoppel to hold that petitioner was precluded from pursuing her personal injury action as a result of her misrepresentation to another Court.

ARGUMENT

I. Petitioner has presented no valid grounds for a Writ of Certiorari to be granted.

This case involves Georgia's application of its doctrine of judicial estoppel. There is no federal question. This is a state law tort action decided under state law principles. The fact that the state doctrine of judicial estoppel was modeled on a federal doctrine does not make this a federal law question. In a diversity action involving judicial estoppel, the United States Supreme Court has held that the doctrine of judicial estoppel is governed by state law. *See Original Appalachian Artworks, Inc. v. S. Diamond Associates, Inc.*, 44 F.3d 925 (11th Circuit, 1995).

Petitioner refers the Court to provisions of the United States Bankruptcy Code as pertinent to this case. However, this case does not involve interpretation of those code sections. This is not a bankruptcy case. The issue is whether a failure to disclose a state court tort claim to the federal Bankruptcy Court during Chapter 13 proceedings

precludes the debtor from prosecuting the state court claim. While federal bankruptcy law governs the bankruptcy proceedings, the issue here is simply the effect of a debtor's actions in bankruptcy court on his or her state court case.

The United States Supreme Court may review a final judgment rendered by the highest court of a state in limited circumstances. Petitioner is requesting this Court to review a decision of the Supreme Court of Georgia, the highest court in which a decision could be had in Georgia. Such final judgment may be reviewed by writ of certiorari where

> . . . the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C.A. § 1257(a). Petitioner has not drawn into question the validity of any United States or Georgia statute on any grounds. While she provides pertinent provisions of the United States Bankruptcy Code, she does not challenge the validity of these provisions. Further, petitioner has not argued that any title, right, privilege or immunity is at issue.

Finally, matters in abatement which do not involve jurisdiction will not be reversed by the Supreme Court. *See* 28 U.S.C.A. § 2105. The term "abatement" has been

defined to mean to overthrow or destroy an action on grounds otner than the cause of action. *Bowles v. Wilke*, 175 F.2d 35 (1949, CA7 Ill.). Summary judgment in this case was granted on grounds other than the cause of action. Summary judgment was granted based upon issues outside the petitioner's cause of action. Therefore, the matter before this Court is one in abatement and will not be reversed by the Supreme Court.

II. The Chapter 13 Trustees rights were hampered not by the state court's granting of respondent's motion for summary judgment, but by the petitioner's failure to disclose her post-petition claim.

Petitioner argues that by affirming the grant of summary judgment in this case, defendants will receive a windfall and that the real parties in interest will be harmed. Instead, the petitioner will receive the windfall. The bankruptcy trustee was discharged on March 30, 1998. Since the time of the discharge, the trustee was no longer the real party in interest. Had the bankruptcy not been discharged, the trustee would be the real party in interest to pursue the petitioner's claim. Any recovery obtained from defendants would then inure to the benefit of petitioner's bankruptcy estate, and in turn, to the creditors who asserted claims to the estate's assets. *See Clark v. Perino*, 235 Ga. App. 444 (1998). However, since the bankruptcy has been discharged, any award against the defendant will inure to the petitioner's own benefit.

Petitioner asserts, citing *In re Griner*, 240 B.R. at 439, that defendants' position punishes the creditors of the

nondisclosing debtor. In fact, petitioner, herself has punished her creditors by failing to disclose a potential asset that might provide assets to fulfill her commitments to her creditors. She cannot place blame on defendants or the Georgia courts for punishing her creditors. The Bankruptcy Court in *Griner* held that the debtors were not judicially estopped from pursuing their prepetition cause of action. However, in that case, the debtors amended their bankruptcy schedules to include the cause of action as an asset before they received their discharge.

III. There is nothing in the record to support petitioner's contention that the trial court failed to rely on evidence in granting appellee's Motion for Summary Judgment or that petitioner's assertion in bankruptcy court was not successful.

Petitioner's contention that the trial court erred by failing to rely upon evidence in granting summary judgment is without merit. There is no evidence that the issue of sufficiency of the evidence was presented at the hearing on respondent's motion. Petitioner's argument that judicial estoppel should be refused on the basis that the debtor's Chapter 13 plan provided for payment of 100% of the debt owed similarly is not supported by the record.

Petitioner's argument was addressed by the special concurrence issued by Judge Blackburn in response to the dissenting opinion in the Court of Appeals decision. *Wolfork et al. v. Tackett et al.*, 241 Ga. App. 633, 635 (1999). Judge Blackburn noted:

> it is well established that the burden is on the party alleging error to show it by the record and where the proof necessary for determination of

> the issues on appeal is omitted from the record, an appellate court must assume that the judgment below was correct and affirm. *Id.* at 635, citing *Griffin v. Travelers Ins. Co.*, 230 Ga. App. 665, 666 (1998).

Further, when a petitioner omits evidence necessary for determination of issues on appeal, affirmation is required. *Id.* The Court of Appeals relied on a presumption in favor of the regularity of the proceedings in a court of competent jurisdiction, assumed the evidence was sufficient to support the trial court's ruling, and affirmed the judgment. *Id.*, citing *Siegel v. Gen. Parts Corp.*, 165 Ga. App. 339 (1983); *Acker v. Jenkins*, 178 Ga. App. 393, 394 (1986). Likewise, this Court must assume the judgment below was correct and affirm.

IV. The Georgia Supreme Court correctly applied the state law doctrine of judicial estoppel.

Petitioner asserts that judicial estoppel should not apply to bar the instant case as there is no evidence that she intentionally asserted a contradictory position. *Chandler v. Samford University* involves facts that are strikingly similar to the facts in the case at bar. 35 F. Supp. 2d 861 (N.D. Ala. 1999). In *Chandler*, the debtor was in Chapter 13 bankruptcy when she filed an E.E.O.C. claim against Samford University. After filing the E.E.O.C. claim, the debtor converted her Chapter 13 bankruptcy to Chapter 7. She failed to disclose the existence of her E.E.O.C. claim at any time during the pendency of her Chapter 13 bankruptcy or at the time of its conversion to Chapter 7. *Id.*

The District Court held that judicial estoppel barred the E.E.O.C. claim. In so holding, the Court accepted the two-prong test for judicial estoppel, requiring a demonstration that the assertion of the claim is inconsistent with the earlier non-disclosure and that the assertion of inconsistent positions is an attempt to deliberately manipulate the judicial system. *Id.* In concluding that the facts in Chandler satisfied the second prong of the test, the Court noted first that the debtor had knowledge of her claims against Samford during the pendency of her Chapter 13 proceeding. *Id.* As support for this, the Court points out that the debtor certainly became aware of her claim when she filed an E.E.O.C. charge. Petitioner Wolfork similarly must have been aware of her personal injury claim on October 21, 1997, when she filed suit in the State Court of Clayton County. As in Chandler, this occurred during the pendency of a Chapter 13 bankruptcy.

The Court in Chandler next notes that the debtor had an affirmative duty to disclose her claim against Samford, as required by 11 U.S.C. § 541(a)(7). *Id.* Despite this affirmative duty, Chandler, like petitioner Wolfork, chose not to amend her schedule to reflect her assets.

Lastly, the Court discusses Chandler's motive for concealing her claims. In Chandler, the non-disclosure prompted the bankruptcy court to proceed as if Chandler's case were a "no asset case" and may have contributed to the choice made by the parties in interest not to raise objections to the administration of the estate. Here, petitioner's failure to alert her creditors of a potential asset likely affected the creditors' actions, as well as the creditors' ability to take any action at all.

A recent United States District Court decision analyzed Georgia law on the issue of judicial estoppel in the context of divergent pleadings filed in federal bankruptcy and state civil courts. *Scoggins v. Arrow Trucking Company*, 92 F.Supp.2d 1372 (S.D.Ga. 2000). The *Scoggins* court notes that

> judges focus on the debtor's intent, and that includes attempts to correct (rather than exploit) an unfair tactical advantage one otherwise gains by failing to timely disclose litigation claims to the bankruptcy court.

Id., citing *Reagan v. Lynch*, 241 Ga. App. 642 (1999). While application of the doctrine of judicial estoppel is severe, the court notes that "whether to apply it depends entirely on the actions of the plaintiff." *Id.* The court further concluded that the petitioner should not be allowed to reopen and amend his petition after the filing of a motion for summary judgment as "he is only disclosing the claim when forced by his adversary to do so." *Id.* at 1375.

> Scoggins should not be permitted to duck his bankruptcy court disclosure obligation, then "fess up" without consequence once exposed by his adversary. He knew of the facts giving rise to his inconsistent positions, and he had a motive to conceal this claim. That is enough.
>
> * * *
>
> Society's core message, as expressed in over 100 false statements statutes, in its bankruptcy concealment and tax fraud laws, and in its statutory prohibition against deceiving government agencies, is clear: those who actively or passively (by failing to disclose material facts) deceive the government – especially the judicial branch,

> which so heavily depends upon truthful disclosures under oath – should, at a minimum, reap no advantage from doing so. That message would be disserved by giving Scoggins a free pass here.

Id. at 1376. (Citations omitted).

Petitioner's actions are, at best, passive deception. As in Scoggins, the petitioner here should reap no benefit from her deception.

Petitioner argues that judicial estoppel creates a "loop-hole" that allows defendants to escape judicial process and evade justice. The obligation to tell the truth and file accurate and honest pleadings is not the stuff of loop holes. Petitioner is not estopped from prosecuting her personal injury action because of a loop hole. Rather, she is barred as a result of a breach of her obligation to tell the truth and make full disclosure, as required by law, to Courts, trustees, creditors and others. The Supreme Court of Georgia, the Georgia Court of Appeals and the trial judge all acted properly in applying and upholding the principle of judicial estoppel as adopted and as is enforced in Georgia. Judicial estoppel is understandably an unattractive resolution to one in petitioner's position. However, that position was of petitioner's own making. Further, preserving the integrity of the courts by insisting upon consistent, accurate and honest pleadings in courts of law is critical to our legal system.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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